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March 26, 2019

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation
by AmeriFactors Financial Group, LLC
CG Docket Nos. 02-278 and 05-338

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Federal Communications Commission's ("FCC's") rules, the undersigned counsel hereby provides notice that on March 25, 2019, AmeriFactors Financial Group, LLC ("AmeriFactors") met with certain Commission personnel concerning its pending Petition for Expedited Declaratory Ruling filed July 13, 2017 in the above-captioned proceedings ("Petition"). Representatives of AmeriFactors met with Michael Scurato, Acting Legal Advisor for Media and Consumer Protection to Commissioner Geoffrey Starks, and, in a separate meeting, with Travis Litman, Chief of Staff and Senior Legal Advisor, Wireline and Public Safety to Commissioner Jessica Rosenworcel. In attendance on behalf of AmeriFactors were the company's President and Chief Executive Officer Kevin Gowen (via telephone conference), Senior Vice President and General Counsel Angela Fiorentino (via telephone conference), and Steven Augustino and Jennifer Wainwright of Kelley Drye & Warren LLP.

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In the meetings, AmeriFactors urged the Commission to grant its Petition promptly for numerous reasons.¹ In particular, AmeriFactors noted that, while robocalling is a top consumer complaint to the FCC, junk faxing decidedly is not. In May 2018, the FCC noted in its Report on Unsolicited Advertisements, sent to Congress pursuant to the Junk Fax Prevention Act of 2005, that junk fax complaints had declined nearly 95% from their 2007 peak.² Indeed, faxing complaints between May 2017 and April 2018 averaged only 260 complaints per month.³ This decrease in complaints is likely due to technological advances that have greatly displaced traditional facsimile machines of the past. At this point, most Americans have migrated away from facsimile transmissions in favor of e-mail, texting, instant messaging and other forms of document sharing. Those that maintain a “fax” presence are increasingly relying upon cloud-based online fax services to replace the telephone facsimile machine technology. Indeed, “faxing” a document is almost as much a misnomer these days as “dialing” a telephone number.⁴

With this technological displacement, recipients of fax-like transmissions have gained the tools necessary to avoid the harms that underlie the fax advertising restrictions of the Telephone Consumer Protection Act of 1991 (“TCPA”). AmeriFactors emphasized that “faxes” received via online fax services do not impose the cost of ink or paper on recipients and do not

¹ The district court hearing the complaint against AmeriFactors has granted a stay through March 28, 2019 to allow for FCC input on this important question. AmeriFactors therefore urged the Commission to provide guidance as soon as possible.

² Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements, at Appendix (unnumbered page) (May 2, 2018) (“2018 Report on Unsolicited Facsimile Advertisements”) (excerpt attached as **Exhibit A** to this letter). Similarly, the last enforcement action relating to unlawful faxes was initiated in February 2014 – five years ago. *See Scott Malcolm, DSM Supply, LLC, Somaticare, LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 2476 (2014).

³ *Id.*

⁴ There are a great many terms which have become overtaken by technology, but which are still used in common language, such as “tuning” to a radio station, “taping” movies or shows, and “carbon copying” or “cc’ing” someone on a message. *See*, <https://mashable.com/2014/03/04/old-tech-terms/#5cKLGWYg9Eqw>. Increasingly, “receiving a fax” falls into the same category.

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“tie up” telephone lines, as was the case with facsimile equipment in 1991.⁵ These services also do not use a “regular telephone line” as part of the transmission. Therefore, modern fax services do not fit within the scope of the TCPA.

AmeriFactors asks the Commission to respond to those changes by declaring that the TCPA means what it says when it limits its scope to transmissions received on a “telephone facsimile machine” and does not reach transmissions received by online fax services that only mimic the old facsimile capability.⁶

AmeriFactors also noted in the meetings that granting its petition will not increase the incidence of unwanted facsimile advertisements, nor would it leave consumers of online fax services without remedies to police unwanted communications. With respect to users of online facsimile services, if the FCC concludes that the CAN-SPAM Act applies to such communications, then remedies under that Act are available to consumers. In addition, customers of online fax services are capable of blocking unwanted messages themselves, without the prohibitions of the TCPA. Most online fax services allow “blacklisting” of incoming numbers and other methods to address unwanted communications. Even if an unwanted message makes it through, its “harm” is akin to e-mail spam – the customer need just ignore the message.

Finally, AmeriFactors noted that the question regarding interpretation of the term “capacity” in the context of the TCPA’s telephone facsimile machine definition mirrors the questions before the FCC in the context of the definition of an automated telephone dialing system (ATDS). Just as in the *ACA International v. FCC*⁷ remand, the Commission here also faces questions about the extent to which changes in technologies have replaced the equipment identified in the statutory text. The FCC should faithfully interpret the statute consistent with actual language and Congressional intent, and not attempt to modify the definition to address technologies that Congress has not contemplated. AmeriFactors also noted that an interpretation that is faithful to the statute would protect good faith actors from excessive potential TCPA liability, by clarifying the specific factual information that is relevant to determine consumers harmed by an alleged unsolicited advertisement. The FCC would not be overstepping its role in

⁵ See Petition at 16-19.

⁶ 47 U.S.C. § 227(a)(3) (definition of “telephone facsimile machine”); See Petition at 12-16. See also 47 U.S.C. § 227(b)(1)(C) (expressly limiting the scope of the TCPA to fax advertisements received on a telephone facsimile machine) (attached as **Exhibit B** to this letter).

⁷ See *ACA Int’l. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

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clarifying the facts that comprise a claim under the unsolicited fax advertisement provisions of the TCPA.

For the reasons discussed above, AmeriFactors respectfully requests that the Commission move quickly to grant its petition and declare that fax advertisements the recipient receives through online fax services or on a device other than a "telephone facsimile machine" are not subject to the TCPA.

Respectfully submitted,



Steven A. Augustino

*Counsel for AmeriFactors Financial
Group, LLC*

Exhibits

cc: M. Scurato
T. Litman

EXHIBIT A

EXCERPT FROM “2018 REPORT ON UNSOLICITED FACSIMILE ADVERTISEMENTS”

APPENDIX—Data for May 1, 2017 through April 30, 2018

1. Complaints

During this reporting period, the Commission's Consumer and Governmental Affairs Bureau (CGB) received 3124 junk fax complaints, a rate of 260 complaints per month. This continues the steep decline in junk fax complaint receipts, showing a decline of nearly 95 percent from the peak of junk fax complaints during 2007 – 2008. CGB has responded to each consumer who filed a complaint, acknowledging receipt and emphasizing that although the Commission does not adjudicate individual complaints, these filings are crucial to the Commission's efforts to effectively enforce junk fax requirements and protect consumers against unwanted fax advertisements. The Enforcement Bureau reviews complaints to facilitate identification of the most serious violators although positive identification may ultimately not be possible for a number of reasons.

2. Citations, Notices of Apparent Liability for Forfeiture, Consent Decrees, Forfeiture Orders, and Orders on Reconsideration

From May 1, 2017 through April 30, 2018, the Commission dismissed, and in the alternative denied, a petition for reconsideration seeking to overturn or reduce a \$1.84 million forfeiture for junk fax violations by an individual whose advertisements for chiropractic equipment disrupted the operations of numerous health care offices.

The Commission did not issue any citations, notices of apparent liability for forfeiture, or forfeiture orders, and did not enter into any consent decrees, during the period covered by this report.

3. Referrals to the Department of Justice of Unpaid Forfeiture Penalties

When the FCC issues a forfeiture order, it generally gives the subject thirty days to pay the penalty. As with any order issued by the Commission, the Communications Act also gives the subject thirty days after the Commission gives public notice of any forfeiture order to seek reconsideration of that order.⁹ If the subject neither pays the penalty nor seeks reconsideration, the FCC then, at the request of DOJ as a prerequisite for referral, issues a demand letter, requiring payment within thirty days. If the subject still does not pay the forfeiture, the FCC prepares the pleadings for DOJ to file in court to enforce the forfeiture, and formally refers the matter to DOJ.

The length of time between the FCC's issuance of a forfeiture order and referral to DOJ may be slowed by a number of factors. If the FCC has issued, or foresees that it may issue, more than one forfeiture order against the same subject, it may defer referral of the first order until it has issued the subsequent orders. In addition, the subject of a forfeiture order may express interest in settlement at any point in the process, and consideration and

⁹ 47 U.S.C. § 405(a).

EXHIBIT B

EXCERPT FROM
47 U.S.C. § 227(b)(1)(C)

47 U.S.C. § 227(b)(1)(C)

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States-

...

(C) to use any telephone facsimile machine, computer, or other device to send, *to a telephone facsimile machine*, an unsolicited advertisement, unless-

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through-

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E).